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Illinois Commerce Commission
On Its Own Motion

Amendment of 83 Ill. Adm. Code 200 And
Amendment of 83 Ill. Adm. Code 761,
83 Ill. Adm. Code 762, 83 Ill. Adm.
Code 763, And 83 Ill. Adm. Code 766

Docket Nos. 00-0353
And 00-0354 Consol.

REPLY COMMENTS OF COMMONWEALTH EDISON COMPANY

Commonwealth Edison Company ("ComEd"), pursuant to 5 ILCS 100/5-40(b) and the order of the Hearing Examiner, hereby submits its reply comments on proposed amended 83 Ill. Adm. Code Parts 200, 761, 762, 763, and 766.

INTRODUCTION

The Illinois Commerce Commission ("the Commission") has received the respective initial comments of ComEd and six other parties, including the Commission's Staff ("Staff"), on the proposed Rules. ComEd, upon consideration of the other parties' initial comments, adheres to the recommendations made by ComEd in its initial comments. ComEd, with limited exceptions, supports or makes no objection to the recommendations made by the other parties in their initial comments.

ComEd, in its initial comments, stated that its principal concern with the proposed Rules is the provisions regarding the setting of expiration dates for protective orders. This remains ComEd's principal concern. ComEd continues to be of the view that the proposed Rules, which set a maximum duration of five years for a protective order, afford parties, Hearing Examiners, and the Commission insufficient flexibility to adequately address and protect the concerns that are served by the entry of protective orders.

The City of Chicago (“the City”) has expressed two additional concerns regarding proposed Rule 200.430(b) and (c), which is one of the proposed Rules relating to protective orders. ComEd, in its reply comments, addresses the City’s two additional concerns. ComEd supports the City’s recommended modification of proposed Rule 200.430(c).

ComEd, in its initial comments, also expressed concern that, when the Commission formulated the proposed Rules, the Commission did not have the benefit of the federal Electronic Signatures in Global and National Commerce Act (the “ESGNCA”), S. 761, Pub. L. 106-229, 114 Stat. 464 (June 30, 2000). ComEd now has had further opportunity to consider the implications of the ESGNCA for the proposed Rules. ComEd believes that the proposed Rules may be applied consistently with the ESGNCA.

ComEd has additional reply comments relating to a few of the other initial comments of the other parties. ComEd proposes certain related modifications of the proposed Rules.

REPLY COMMENTS AND PROPOSED MODIFICATIONS

I. Protective Orders

Proposed Rule 200.430(b) and (c) provides that:

- b) A person filing a motion for a protective order shall specify the proposed expiration date for the proprietary status of the data, information or studies. The proposed expiration date shall be no more than five years from the date of submission. If no date is specified, the proposed expiration date for the proprietary status of the any [*sic*] data, information or studies shall be two years from the date of submission.
- c) An electronic document submitted and marked as proprietary shall be treated as a request for a protective order under this Section.

Docket No. 00-0353 (Order May 16, 2000) (Appendix B at proposed Rule 200.430(b) and (c)).¹ Proposed Rules 761.240(b) and (c), 762.220(b) and (c), 763.230(b) and (c), and 766.30(b) and (c) contain the same language.

As indicated above, ComEd's principal concern in this consolidated rulemaking proceeding remains the proposed Rules regarding the setting of expiration dates for protective orders. Again, ComEd adheres to the view that the proposed Rules, which set a maximum duration of five years for a protective order, afford parties, Hearing Examiners, and the Commission insufficient flexibility to adequately address and protect the concerns that are served by the entry of protective orders. ComEd, in its initial comments, accordingly recommended appropriate modifications of the proposed Rules.

The City has expressed a separate concern regarding proposed Rule 200.430(c).² (The City of Chicago's Comments on First Notice Rules ["City Init. Comments"], pp. 2-3). Proposed Rule 200.430(c) essentially provides that the submission and marking of an electronic document as proprietary should be treated as a "request for a protective order". The City has pointed out that proposed Rule 200.430(c) thereby creates a number of procedural problems and uncertainties. The City has proposed a modification to proposed Rule 200.430(c) that would address this concern. (The City, when proposing this modification, mistakenly referred to proposed Rule 200.430(b)). ComEd supports the City's recommended modification of proposed

¹ ComEd hereinafter will refer to and cite the proposed Rules as such without reference to the underlying Orders and Appendices.

² The City and the other parties that filed initial comments, unlike ComEd, have addressed their comments only to proposed amended 83 Ill. Adm. Code Part 200, even where, as here, there are parallel provisions in proposed amended 83 Ill. Adm. Code Parts 761, 762, 763, and 766. As a general proposition, ComEd believes that, if the Commission chooses to modify proposed amended 83 Ill. Adm. Code Part 200, then the Commission should make the same modifications in the parallel provisions of proposed amended 83 Ill. Adm. Code Parts 761, 762, 763, and 766.

Rule 200.430(c). ComEd recommends that the same modification also be made in the parallel language of proposed Rules 761.240(c), 762.220(c), 763.230(c), and 766.30(c).

The City, in passing, also stated that proposed Rule 200.430(b) “seems to presume a grant of what should be a request for protection -- not notification of a binding determination by the submitted.” (City Init. Comments, p. 3). The City did not point here to any particular language in proposed Rule 200.430(b), nor propose any particular modification of proposed Rule 200.430(b). ComEd does not understand proposed Rule 200.430(b) to vest the party seeking a protective order with the ability to make a “binding determination” that a protective order will be granted or that it will be in force indefinitely or for any particular period. ComEd infers that the City intended that its concern be addressed by its recommended modification of proposed Rule 200.430(c), discussed above. ComEd believes that the City’s concern is addressed by that recommended modification.

II. The New Federal Legislation

As indicated above, ComEd, in its initial comments, expressed concern that, when the Commission formulated the proposed Rules, the Commission did not have the benefit of the ESGNCA. As stated earlier, ComEd now has had further opportunity to consider the implications for the proposed Rules of the ESGNCA, and ComEd believes that the proposed Rules may be applied consistently with the ESGNCA.

III. Other Provisions

As noted above, ComEd has additional reply comments relating to a few of the other initial comments of the other parties. ComEd recommends certain related modifications of the proposed Rules.

Proposed Rules 200.100(a), 200.170(a), 200.200(a), 761.130(a), 762.210(a), 766.20(d)(1). ComEd, in its initial comments, recommended that these proposed Rules contain additional language indicating that a party that does not have a facsimile number or an e-mail address is not required to submit such information. Staff, in its initial comments, has recommended that proposed Rule 200.100(a) be modified by changing the term “facsimile number” to “any facsimile number”. (Staff’s initial comments (“Staff Init. Comments”), p. 1). ComEd agrees with Staff’s recommendation, but ComEd further recommends that proposed Rule 200.100(a) also be modified by changing the term “e-mail address” to “any e-mail address”. ComEd believes that, given the punctuation of proposed Rule 200.100(a), the inclusion of the word “any” before “facsimile number” modifies only “facsimile number” and not “e-mail address” (or “telephone number”). ComEd recommends that the same modifications also be made in the parallel language of proposed Rules 200.170(a), 200.200(a), 761.130(a), 762.210(a), 766.20(d)(1).

Proposed Rules 200.110(a), 762.105(a), 763.105(a), and 766.12(a). Staff recommends that proposed Rule 200.110(a) be modified to clarify that the “8-1/2 by 11 inch requirement” is applicable to typewritten and printed documents. (Staff Init. Comments, p. 2). ComEd agrees with Staff’s recommendation. ComEd recommends that the same modification also be made in the parallel language of proposed Rules 762.105(a), 763.105(a), and 766.12(a).

Proposed Rules 200.110(b), 761.105(b), 762.105(b), 763.105(b), and 766.12(b). Staff recommends modifying proposed Rule 200.110(b), which sets a minimum font size of 12 points for electronic documents, essentially to require that headers, footers, footnotes, and exhibits have a minimum font size of ten points. (Staff Init. Comments, p. 2). Peoples Gas Light and Coke Company and related entities (“Peoples”) recommend modifying proposed Rule 200.110(b) to

set a minimum font size of eight points for headers, footers, and footnotes. (Comments of [Peoples] ["Peoples Init. Comments"], Appendix A thereto, p. 2). ComEd supports Staff's recommendation as to headers, footers, and footnotes, but opposes Staff's recommendation as to exhibits, for reasons noted below. ComEd recommends that Staff's recommended modification as to headers, footers, and footnotes also be made in the parallel provisions of proposed Rules 761.105(b), 762.105(b), 763.105(b), and 766.12(b).

ComEd, in its initial comments, recommended that proposed Rules 200.100(b), 761.105(b), 762.105(b), 763.105(b), and 766.12(b) be modified by the addition of a provision that: "All exhibits of a documentary character shall, whenever practical, conform to said requirement." ComEd's recommendation is based on the language regarding such exhibits in 83 Ill. Adm. Code § 200.110(a). ComEd adheres to this recommendation. ComEd believes that, as to exhibits, a more flexible approach is needed, and that setting a minimum font size that applied to all exhibits would be contrary to well-established reasonable practice and impractical.

Proposed Rule 200.110(d), 761.105(b), 762.105(b), 763.105(b), 766.12(b). Staff recommends adding a new subsection "d" to proposed Rule 200.110 that would provide:

Testimony and schedules prepared for the purposed [*sic*] of being entered into evidence shall include line numbers on the left-hand side of each page of text and on the left-hand side of each schedule. Text documents shall include continuous line numbers. Schedules shall include line numbers that begin anew for each page of the schedule.

(Staff Init. Comments, p. 3). ComEd does not object to Staff's recommendation as to testimony. ComEd is concerned that Staff's recommendation may not be practical for many types of schedules. Also, ComEd is not aware of the basis for Staff's recommending continuous line numbering for testimony but not for schedules. ComEd accordingly recommends that Staff's recommendation, if it were to be adopted, be further modified as follows:

Testimony prepared for the purpose of being entered into evidence shall include line numbers on the left-hand side of each page of text. Testimony shall include continuous line numbers. Schedules to testimony shall, whenever practical, conform to said requirements.

ComEd's recommendation relating to schedules is based on the language regarding "exhibits of a documentary character" in 83 Ill. Adm. Code § 200.110(a). ComEd, to the extent that the proceedings contemplated by proposed amended 83 Ill. Adm. Code Parts 761, 762, 763, and 766 may encompass the filing of testimony, would recommend that, if a new subsection "d" were to be added to proposed Rule 200.100, then parallel new subsections also should be added to proposed Rules 761.105, 762.105, 763.105, and 766.12.

Proposed Rule 200.150(g). Staff recommends that Rule 200.150(g) be modified by adding that the Commission may serve by electronic means the notice of an application, petition, or complaint that initiates a contested case or licensing proceeding. (Staff Init. Comments, p. 3). Staff bases this recommendation on a recent amendment to Section 10-108 of the Public Utilities Act, 220 ILCS 5/10-108. Staff does not limit its proposal to instances where the recipient has agreed to service by electronic means.

ComEd opposes Staff's recommendation, and ComEd instead recommends a different modification of proposed Rule 200.150(g). The notice of an application, petition, or complaint that initiates a contested case or licensing proceeding plays a vital role in Commission practice, and may be the first notice to the recipient of the case or proceeding. The Commission's existing rule reflects the importance of this type of notice by requiring the Commission to serve such a notice by personal delivery or registered or certified mail. 83 Ill. Adm. Code § 200.150(g). Service by electronic means of this important type of notice, without a process for express waiver of service by personal delivery or registered or certified mail, is inappropriate. Service by electronic means of this important type of notice, without such a further process, would create

significant and unnecessary risks that the recipient will not receive, will not timely receive, or will not timely realize that they have received, the notice. These risks flow from the nature of e-mail systems and processes and how they are used, the risks of one e-mail among many being overlooked or mistakenly deleted, and the risks of e-mail misdirection, outages, viruses, and worms, as is discussed further in the next portion of these reply comments. Indeed, service by electronic means of this important type of notice, without a process for express waiver of service by personal delivery or registered or certified mail, is sufficiently risky that it might raise due process concerns. U.S. Const., amend. XIV; Ill. Const., art. I, § 2. See Quantum Pipeline Co. v. Illinois Commerce Comm'n, 304 Ill. App. 3d 310, 320, 709 N.E.2d 950, 956 (3d Dist.) (lack of notice violated due process), appeal denied, 185 Ill. 2d 665, 720 N.E.2d 1105 (1999). Also, Staff's proposal is inconsistent with proposed Rules 200.1050(a), 761.1050(a), 762.1050(a), 763.1050(a), 766.1050(a), in that these proposed Rules permit service by electronic means only by agreement. ComEd does not believe that this policy should be altered, as is discussed in the next portion of these reply comments, much less altered for the important type of notice involved in Rule 200.150(g).

In many instances, service of this important type of notice by electronic means would be faster and more efficient than more service by traditional means. Therefore, ComEd believes that service by electronic means of such a notice, if accompanied by a process for express waiver of service by personal delivery or registered or certified mail, would accommodate what ComEd understand to be the objectives of Staff's recommendation without any off-setting risk or detriment and would be appropriate. Section 2-213 of the Code of Civil Procedure, 735 ILCS 5/2-213, which provides a procedure for waiver of service by traditional means, provides a

model for such a process. ComEd accordingly recommends that the following language be added after the first sentence of proposed Rule 200.150(g):

Notwithstanding the foregoing, the Commission may serve by electronic means the notice provided for in subsection (f), provided that the subject line of the electronic message states "OFFICIAL COMMISSION NOTICE OF CASE OR PROCEEDING" and further provided that, if the recipient within two business days does not acknowledge receipt of the notice and expressly waive service by personal delivery or registered or certified mail, then the Commission shall serve the notice by personal delivery or registered or certified mail.

ComEd believes that this language, which is based on the procedure provided for in 735 ILCS 5/2-213, appropriately accommodates the competing concerns regarding service of this important type of notice.

Proposed Rules 200.1050(a), 761.1050(a), 762.1050(a), 763.1050(a), 766.1050(a).

ComEd opposes Peoples' recommendation that proposed Rule 200.1050(a) be modified to permit a party to serve an electronically filed document by electronic means on parties that have not agreed to accept electronic service. (Peoples Init. Comments, pp. 3-4, and Appendix A thereto, pp. 5-6). Peoples expressed the view that there are efficiency gains with electronic service. ComEd does not disagree that there often are efficiency gains with electronic service. However, there also generally are greater risks of an electronically served document being misdirected, ignored, or "lost", especially in a large organization, as compared with a "hard copy" served document. In addition, an electronically served document may be inaccessible, or not readily accessible, to persons within an organization other than the recipient. The recipient, of course, may be in the office, at home, or out of town. Also, there are significantly greater chances of an e-mail outage or of a computer virus or worm that unduly delays or destroys e-mail than of a "hard copy" served document being unduly delayed or destroyed. If a party has

agreed to accept electronic service, then that agreement presumably reflects a determination by the party that it has processes and systems in place that obviate or minimize these risks. However, if a party has not agreed to accept electronic service, then that lack of agreement presumably reflects a determination that electronic service would be or is likely to be problematic. Thus, taking into account the competing considerations, ComEd believes that proposed Rule 200.1050(a), which allows electronic service only by agreement, is the preferable approach. ComEd notes that the relevant language of proposed Rule 200.1050(a) is paralleled in proposed Rules 761.1050(a), 762.1050(a), 763.1050(a), and 766.1050(a).

ComEd believes that Peoples' concern would partly be addressed, without any off-setting risk or detriment, if the proposed Rules further facilitated agreements to accept electronic service. ComEd believes that the proposed Rules could further facilitate such agreements by directing parties to indicate whether they agree to accept service by electronic means. More specifically, ComEd accordingly recommends that proposed Rule 200.90, which governs Appearances, have added to it a new subsection "f" that states: "A party, in its appearance, shall state whether it agrees to accept service by electronic means as provided for in Section 200.1050. A party later may agree, or may revoke its agreement, to accept electronic service, provided that the party shall file and serve a notice of the later agreement or revocation." ComEd also accordingly recommends that proposed Rule 200.100(a) have added to it at the end the following language: "A party, in its first pleading in a proceeding, shall state whether it agrees to accept service by electronic means as provided for in Section 200.1050. A party later may agree, or may revoke its agreement, to accept electronic service, provided that the party shall file and serve a notice of the later agreement or revocation." ComEd further recommends that language that parallels this language also be added to the parallel provisions of proposed Rules 200.170(a),

200.200(a), 761.130(a), 762.210(a)(1), and 766.20(d)(1). ComEd notes that some slight variations in terminology and punctuation would be needed to make the additional language appropriate in the context of the latter proposed Rules.

ComEd anticipates that the vast majority of parties will agree to accept service by electronic means. ComEd therefore expects that the efficiency gains that Peoples seeks typically will be attained, in any event.

Finally, ComEd has concerns regarding Peoples' proposal to modify the final sentence of proposed Rule 200.1050(a). (Peoples Init. Comments, Appendix A thereto, p. 6). The final sentence of proposed Rule 200.1050(a) states: "When serving by electronic means, service is deemed complete on the day of electronic transmission if transmitted prior to 5:00 p.m. on that day." ComEd, in its initial comments, discussed why the clause "prior to 5:00 p.m. on that day" is problematic, and recommended that that clause be deleted and replaced by the clause "at or before the time due". Peoples, without discussing its grounds, recommends that the clause "prior to 5:00 p.m. on that day" be followed by a new clause "except weekends and legal holidays". Peoples did not indicate what would be deemed the date of service for an electronic transmission on a weekend or legal holiday, although ComEd assumes that Peoples intended that the date of service would be deemed to be the next business day. ComEd accordingly proposes that ComEd's and Peoples' recommendations be harmonized and clarified by the deletion of the clause "prior to 5:00 p.m. on that day" and the addition of the following language: "at or before the time due, except service by electronic means on weekends and legal holidays shall be deemed complete on the next business day."

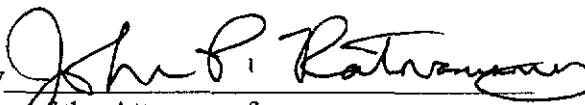
CONCLUSION

For the foregoing reasons and all reasons appearing of record, Commonwealth Edison Company respectfully submits that the proposed Rules should be amended as set forth in its initial comments and as set forth above.

Dated: August 1, 2000

Respectfully submitted,

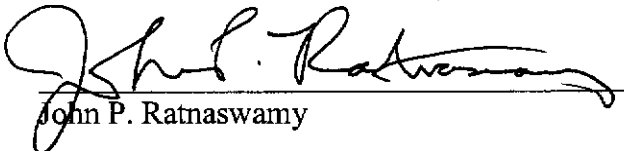
COMMONWEALTH EDISON COMPANY

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that genuine copies of the foregoing Reply Comments of Commonwealth Edison Company were served electronically and by deposit in the United States mail, first class postage prepaid, at Three First National Plaza, 70 West Madison Street, Chicago, Illinois 60602, addressed to each of the parties on the attached Service List on August 1, 2000, before 5:00 p.m.



John P. Ratnaswamy

One of the Attorneys for
Commonwealth Edison Company

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

**Illinois Commerce Commission
On Its Own Motion**

**Amendment of 83 Ill. Adm. Code 200 And
Amendment of 83 Ill. Adm. Code 761,
83 Ill. Adm. Code 762, 83 Ill. Adm.
Code 763, And 83 Ill. Adm. Code 766**

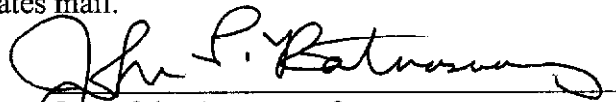
**Docket Nos. 00-0353
And 00-0354 Consol.**

NOTICE OF FILING

To: All Parties On The
Attached Service List

PLEASE TAKE NOTICE that on August 1, 2000, Commonwealth Edison Company filed the attached Reply Comments of Commonwealth Edison Company with the Clerk of the Illinois Commerce Commission in the above-captioned consolidated rulemaking proceeding. Said filing was made by deposit in the United States mail.

Dated: August 1, 2000


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